

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-211724
B-211724.2

DATE: January 14, 1985

MATTER OF: Jervis B. Webb Company; Eaton-Kenway, Inc.

DIGEST:

1. Agency characterized protester's Freedom of Information Act (FOIA) request as protest and denied it for failure to state a basis of protest; protester subsequently protested to agency in detail after receipt of FOIA materials and protested to GAO within 10 working days of agency's denial of protester's self-styled "appeal of the denial of our protest." GAO finds that protester did not have any basis for protest until receipt of FOIA materials and, therefore, that protester's initial protest was filed only after receipt of material. Subsequent protest filed at GAO within 10 working days of agency's denial of initial protest is timely.
2. Sole-source award of contract on total-package basis is unjustified where evidence supports conclusion agency took little or no action to identify and to evaluate possible alternatives. However, because contract is in advanced stage of completion, agency should issue solicitation in connection with evaluation of whether to exercise options.

Jervis B. Webb Company (Webb) protests the sole-source award of contract No. DLA400-83-C-1419 to the Sperry Corporation (Sperry) by the Defense Logistics Agency (DLA). Eaton-Kenway, Inc. (Eaton) has filed a related protest against DLA's inclusion of certain option provisions in Sperry's contract. We sustain Webb's protest. Since our resolution of Webb's protest and our recommendations for corrective action are dispositive of this matter, we do not reach Eaton's protest, although we have considered Eaton's comments to the extent they are relevant to Webb's protest.

On February 24, 1983, DLA awarded Sperry a sole-source letter contract, subject to "definitization," in the estimated amount of \$2 million for the development of

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specifications and design of automated materials handling systems (referred to by DLA as "Integrated Materials Complexes" or IMC's) for two DLA supply depots. (IMC's are, in effect, computerized warehouses in which the picking, packing and shipping functions, for instance, are all automated.) DLA required that the IMC's be compatible with DLA's existing systems, primarily the MOWASP (Mechanization of Warehousing and Shipment Processing) system. This latter system handles the bookkeeping chores associated with inventory control, such as keeping track of orders received, parts in stock, etc., whereas the IMC was expected to handle the physical inventory functions, such as picking parts out of bins, packing and crafting them and labeling them for shipment. To coordinate these functions, the IMC would have to be able to accept an order issued by MOWASP and then report to MOWASP when shipment actually occurred. The final contract includes option provisions in the approximate amount of \$58 million for the installation of the two systems. There was no public notice of the procurement until a synopsis of the award of the letter contract was published in the Commerce Business Daily (CBD) on March 9, 1983, after award of the contract.

Sperry was at this time developing an IMC for the Navy known as the Naval Integrated Storage, Tracking and Retrieval System, or NISTARS. DLA justified the sole-source procurement to Sperry on the basis that NISTARS was the only known system capable of meeting DLA's minimum needs within the required time. The contract also contemplates the adaptation of Navy NISTARS warehouses to DLA depots to house the IMC's.

DLA's rationale for the sole-source determination can be summarized as follows: (1) the design and integration of the IMC system software with DLA's existing inventory support systems is critical to the success of the IMC; (2) given the complexity of the effort, the less original design that is required, the less the risk of unacceptable delays or failures; and (3) by adapting NISTARS software, which was estimated to be 75 percent compatible with the IMC, DLA will minimize these risks. DLA's support for this rationale is reflected in four documents:

- I. A determination and findings (D&F) which states that DLA proposed to acquire services for the design of IMC's for two depots and, at the option of the government, require the contractor to furnish and install the systems. The estimated

amount of the contract is \$2 million. As justification for the negotiation of the contract, the D&F states that although it is possible to describe performance standards, it was not possible for DLA to draft adequate design specifications to permit an advertised procurement. The D&F also notes that NISTARS was scheduled to be operational in March 1983 and incorporates the sole-source justification discussed below.

- II. A sole-source justification which states that DLA has an urgent need to replace the existing material handling and control systems at two depots and describes in general terms the requirements of the needed systems. The justification also states that, based on experience with certain systems within the armed services, the development of a new system is a time consuming and error-prone process. Based on these factors, the D&F concludes that it is essential to use an already existing design and states that NISTARS is the only known system with the capability to achieve the required levels of performance. The sole-source justification also states that the NISTARS software is 75 percent compatible "without major change" with DLA's existing systems and concludes that "failure to utilize the proven and existing NISTARS software to the maximum extent practicable will expose DLA to the very risky and time-consuming process of new software development."
- III. In support of some of the conclusions expressed in the D&F, DLA refers to a one-page, unsigned and undated document entitled "Conclusions," which DLA states outlines a briefing by consultants employed by DLA to look at NISTARS. The portion of this document to which DLA refers states "A ball park estimate indicates that 75 percent of the existing NISTARS software can be used without major change."

IV. DLA also refers to an additional two-page document entitled "Experience with Integrated Materials Systems," which describes, briefly, the problems with two systems known as "AWARES" and "WICS" which lengthened their development time and describes their production rates as about 20 actions per hour. This document also identifies NISTARS as "scheduled to be operational in March 1983," describes several design features of the system, and ascribes a production rate of 50 actions per hour to NISTARS. This document, also unsigned and undated, appears to have been prepared for Webb in response to its FOIA request.

In a one paragraph letter dated March 11, 1983, Webb submitted a request under the Freedom of Information Act, 5 U.S.C. § 552 (1982) (FOIA), for DLA's sole-source justification and a copy of the contract awarded to Sperry; in this letter, Webb advised that it was "formally protesting" the award. DLA forwarded the requested information to Webb in a letter dated March 28 which stated, in part, that "Since your letter contained no explanation of the basis for your protest concerning the award of this contract, I can only deny the protest." Webb responded in a letter dated April 6, 1983, characterized as an "appeal of the denial of our protest," in which Webb challenged DLA's sole-source justification in detail and at length based on the information provided by DLA under the FOIA. DLA responded with a denial of Webb's protest on April 26, 1983. Webb protested to our Office on May 9, 1983.

Webb contends that DLA's award of this contract to Sperry on a sole-source basis was improper. Eaton, which did not file a protest until after the August 1983 "definitization" of Sperry's contract, challenges the inclusion of options for the development and installation of the two systems in Sperry's contract.

TIMELINESS

DLA contends that Webb's protest is untimely (and therefore not for consideration) because Webb allegedly failed to file its protest with GAO within 10 working days of initial adverse agency action on Webb's initial protest to DLA as required by our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1984). DLA regards Webb's first letter,

communicating Webb's Freedom of Information Act (FOIA) request, as Webb's initial protest. We disagree.

Our Bid Protest Procedures are intended to provide protesters and others a fair opportunity to present their cases while minimizing disruption of the government's procurements. See Pennsylvania Blue Shield, B-203338, Mar. 23, 1982, 82-1 C.P.D. ¶ 272. In recognition of this purpose, we have held protests to be timely where a protester diligently pursues, under the FOIA, the information which forms the basis for the protest and files its protest within 10 working days of receipt of that information. See J.C. Yamas Company, B-211105, Dec. 7, 1983, 83-2 C.P.D. ¶ 653; Tracor Jitco, Inc., B-208746, Jan. 31, 1983, 83-1 C.P.D. ¶ 98.

We find nothing in the short announcement in the CBD which might have formed the basis for Webb's protest. We believe that Webb had no information which might have formed a basis for protest until Webb received the materials it had requested from the Navy under the FOIA. We, therefore, regard Webb's initial correspondence with the Navy as nothing more than a request under the FOIA. Moreover, Webb requested this information from the Navy promptly after notice of the contract award appeared in the CBD and promptly protested to the Navy after its receipt of these materials. Webb's subsequent protest to our Office was filed within 10 working days of the Navy's initial adverse action on this protest. Consequently, Webb's protest is timely.

WEBB'S POSITION

Webb contends that DLA's sole-source determination was improper because the bases upon which it was made were inaccurate. In support of this contention, Webb states that several firms have the capability to perform this work and contends that NISTARS was not a proven system at the time DLA's decision was made and that it is not now. From this Webb concludes that DLA's reference to using "75 percent of the proven existing NISTARS software" or to NISTARS as an existing system in support of the sole-source justification was improper.

Webb also contends that, since the IMC project involves the site adaptation of existing designs for both the system and the building, DLA could have competed the separate parts of this contract, e.g., design, development and implementation, and completed the work in about the same time that the

project will take under DLA's sole-source to Sperry. Webb's interpretation of the performance schedule, we note, contemplates the sole-source award of the design contract to Sedlak, a Sperry subcontractor, to which Webb states it would not object.

DLA'S POSITION

DLA contends that its sole-source determination had a reasonable basis. In support of this assertion, DLA states that DLA engineers, with experience in materials handling systems, determined that NISTARS was the only known system with the capability to meet DLA's needs in view of the urgency and technical risks associated with developing a new system. DLA also points out that Sperry was the only one with rights to the NISTARS software, at least until October 1983, when the government would get rights in the software, and that DLA therefore had to sole source to Sperry if the NISTARS system was to be used.

DLA also characterizes Webb's protest as a challenge to DLA's use of a total-package contract and contends that DLA reasonably determined that the components of the system could not be broken out without incurring unacceptable technical risks. DLA also points out that Webb never alleged that it could design DLA's IMC's.

GAO ANALYSIS

DLA refers to an apparent inconsistency between Webb's objections to DLA's sole-source to Sperry for the total project while, at the same time, Webb states that it would not have objected to the sole-source award of the design contract to Sedlak, Sperry's subcontractor. In our opinion, the clear meaning of Webb's statement is that Webb would not have objected to the award of the design contract to Sedlak if the remainder of the contract items were competed. In other words, we interpret Webb's protest as a challenge both to the sole-source award to Sperry and to DLA's determination to procure by a total-package approach rather than by separate procurements of the divisible portions of the contract.

We have greater difficulty reconciling certain apparent inconsistencies in the positions advanced by DLA. We note, for instance, that although DLA's sole-source justification relies heavily on the notion of NISTARS as an imminent, proven system, our review of NISTARS progress reports, requested from the Navy, shows that NISTARS was well behind

the schedule suggested by DLA during the period in which DLA's decision was made. As further evidence, we understand that, at the present time, NISTARS is neither operational nor fully accepted by the Navy, more than 20 months after the "scheduled March 1983 operational date" posited by DLA, which tends to support Webb's assertion that NISTARS was not, contrary to DLA's position, a "proven, existing" system at the time DLA made this determination. We find it difficult to believe, in these circumstances, that reasonable inquiries to the Navy would not have disclosed the actual status of NISTARS and must conclude that DLA either was aware of this information and elected to ignore it in making this sole-source determination or that no such inquiries were made. Moreover, we note that other portions of the consultant's briefing document state that substantial changes will be required to both NISTARS and DLA's existing systems in order for them to function as a system; in our opinion, this raises serious questions about DLA's assertion of NISTARS compatibility as a justification for the sole-source.

As a general rule, procurements must be conducted on a competitive basis to the maximum extent practicable. Because of this requirement for maximum practicable competition, sole-source determinations are subject to close scrutiny by our Office. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 C.P.D. ¶ 402. We have held, however, that sole-source acquisitions may be authorized where (1) the agency's minimum needs can be met only by items or services that are unique, (2) time is of the essence and only one known source can meet the agency's needs within the required time frame, (3) a sole-source award is required to assure compatibility or interchangeability of parts between the procured item and existing equipment, or (4) an award to other than the proposed sole-source contractor would pose unacceptable technical risks. ROLM Corporation, B-210836, Oct. 25, 1983, 83-2 C.P.D. ¶ 492. Similarly, we have consistently held that it is for the contracting officer to determine whether to procure by means of a total package or to break out divisible portions of its total requirements. Chicago City-Wide College, B-212274, Jan. 4, 1984, 84-1 C.P.D. ¶ 51; Secure Engineering Services, Inc., B-202496, July 1, 1982, 82-1 C.P.D. ¶ 2.

The standard we apply is one of reasonableness, i.e., so long as the contracting agency's determination was reasonable, our Office will not question the decision. Federal Data Corporation, 59 Comp. Gen. 283 (1983), 80-1 C.P.D. ¶ 167; Chicago City-Wide College, supra. In order to

satisfy the requirement for reasonableness, however, a determination must reflect the reasoned judgment of the contracting officer based on the investigation and evaluation of the evidence reasonably available at the time. Apex International Management Services, Inc., 60 Comp. Gen. 172 (1981), 81-1 C.P.D. ¶ 24.

In applying these criteria, we have consistently approved of total-package procurements conducted on a competitive basis where the agency reasonably established a requirement for a single contractor approach. See, e.g., Masstor Systems Corporation, B-211240, Dec. 27, 1983, aff'd, B-211240.2, Feb. 24, 1984; Chicago City-Wide College, supra; Southwest Marine, Inc., B-204136, July 30, 1982, 82-2 C.P.D. ¶ 60. We have also approved of sole-source total-package procurements where, for instance, the procurement was intended to fulfill an interim requirement while the agency put together a competitive procurement--and the sole-source determination was the result of two market surveys, Interscience Systems, Inc.; Amperif Corporation, B-201943, B-202021, Aug. 31, 1982, or where the agency reasonably established that only the selected contractor could fulfill its needs without undue technical risk. Hvide Shipping, Inc., B-194218, Aug. 30, 1979, 79-2 C.P.D. ¶ 166.

We find DLA's sole-source justification here to be inadequate. As an initial matter, we note that throughout this protest DLA has argued consistently that NISTARS is capable of meeting DLA's needs; DLA has offered little or nothing, however, which establishes any reasoned basis for the conclusion that only NISTARS could meet its needs. We find, for instance, no evidence of even a limited market survey, such as that in Bird Electronics Corporation, B-205155, June 2, 1982, 82-1 C.P.D. ¶ 519, or of efforts to provide public notice of the procurement in advance of the award, as required by parts 1-10 of the Defense Acquisition Regulation in effect at the time.

Moreover, in view of the unresolved inconsistencies between the underlying information and DLA's determination and the status of NISTARS, discussed above, of which DLA should have been aware, we cannot understand DLA's position that NISTARS was imminently available to fulfill this "urgent" requirement.

In our opinion, the status of NISTARS was uncertain enough--and a reasonable inquiry should have

disclosed this uncertainty--to justify DLA's waiting 8 months from February to October 1983 for the availability of the software while it put together a competitive procurement based, if necessary, on the modification and adaptation of an existing design to meet DLA's needs. In this regard, even if we agree with DLA that the development of a new system for DLA would be an error-prone and time consuming effort, DLA has provided nothing which shows, that the efforts needed to convert NISTARS to meet DLA's requirements would be any less than the effort--and cost--of converting any other system to meet DLA's transaction rate and other requirements. In this connection, we note also that DLA already had a statement of functional requirements for the system--used in the sole-source RFP issued to Sperry in advance of the letter contract--which might have been refined to support a competition. We have stated previously that performance specifications of this type are preferable to design specifications, Viereck Company, B-209215, Mar. 22, 1983, 83-1 C.P.D. ¶ 87, and, given the actual status of NISTARS at the time, we find unpersuasive the suggestion that urgency precluded their refinement and use in a competitive procurement absent some cogent analysis by DLA.

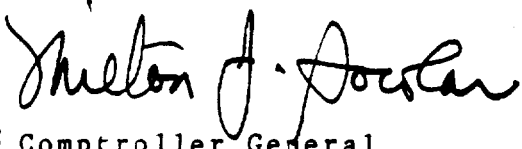
In sum, we find that the record supports the conclusion that DLA did little or nothing to identify and evaluate alternatives which might have satisfied its needs. Webb's protest is sustained.

The determination whether to recommend termination of a contract and recompetition where there has been an unjustified award involves the consideration of several factors, including the severity of the deficiency, the impact on the integrity of the competitive procurement system, the extent of prejudice to potential offerors, the disruption to the government's business, and other factors not enumerated here. In this case, we are mindful not only that DLA's contract with Sperry has proceeded to an advanced state, but that DLA is in the initial stages of evaluating the exercise of the options to implement the systems at the two depots. We are mindful also that we have sustained Webb's protest only against DLA's sole-source determination and have not directly addressed Webb's objections to the total package aspects of this acquisition. Notwithstanding our lack of direct consideration of this latter question, however, we are of the view that DLA's present consideration of options for what is a divisible portion of the total contract effort

provides the best available opportunity for corrective action through issuance of a solicitation, even if it has the effect, perhaps anomalous, of abrogating the total package aspect of the procurement and not the original sole-source.

We therefore recommend that DLA issue a solicitation seeking offers for the implementation of the IMC's at these depots and consider the responses as part of the process of evaluating whether to exercise the options in Sperry's contract.

Because this decision contains a recommendation for corrective action, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and the House Committees on Government Operations and Appropriations, in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.


Acting Comptroller General
of the United States